IN THE HIGH COURT OF PUNJAB AND HARYANA AT

CHANDIGARH

I.T.A. No. 169 of 2007

Date of Decision: 4.10.2007

The Commissioner of Income Tax-III, Ludhiana

...Appellant

Versus

M/s Deep Nursing Home & Children Hospital, Ludhiana

…Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL

Present: Mr. Sanjiv Bansal, Advocate,

for the appellant-revenue.

M.M. KUMAR, J.

This appeal filed under Section 260A of the Income-tax Act, 1961 (for brevity, 'the Act') is directed against order dated 25.9.2006, passed by the Income Tax Appellate Tribunal, Chandigarh Bench 'B', Chandigarh (for brevity, 'the Tribunal'), in ITA No. 681/Chandi/2005, in respect of the assessment year 2004-2005. The revenue has claimed that following substantial questions of law would emerge for determination of this Court from the aforementioned order of the Tribunal:-

1. Whether on the facts and the circumstances of the case, the Tribunal was right in law in treating the payment to persons as professional charges instead of salary in the absence of any bills/expenses

vouchers?

2. Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that these payments were not liable to deduction of tax under Section 192(1) of the Income-tax Act, 1961?

Brief facts of the case are that the Assessing Officer during the course of inspection of books of accounts and other documents noticed that the assessee had paid a sum of Rs. 90,10,136/- to various doctors under the head 'professional expenses'. The assessee was making payments to those doctors who were called for treatment for in-door as well as out-door patients. The assessee submitted before the Assessing Officer that the doctors who are specialist in their respective fields and visited hospital for few hours to provide medical treatment to the patients, were paid their professional fees. It was also submitted that there were no duty hours of such doctors nor there was any control exercised by the management of the hospital over such doctors. In order to buttress the aforementioned stand it was pointed out that no day-to-day attendance register was kept for the visiting doctors and the hospital merely provided them the space and medical equipments to attend the in-door patients. Such doctors would visit, collect their professional charges and were not obliged to stay longer than but was required as per the need of a particular patient. Therefore, the case of the assessee was that there was no employer employee relationship and the payments made to such doctors were not assessable under Section 15 of the Act under the head 'salary'. However, the Assessing

Officer disagreed with the aforementioned contention and held that in the absence of any bill submitted by the doctors for payment and non-maintenance of details of work done by such doctors, it has to be assumed that they were part-time employees of the hospital. It was further held that the payments were their remunerations/salary and the assessee-respondent was required to deduct TDS from the payment under Section 192(1) of the Act and interest under Section 201(1A) of the Act. Accordingly, a demand of Rs. 19,82,247/- was raised under Section 201 and 201(1A) of the Act.

On appeal, preferred by the assessee before the CIT (A), order of the Assessing Officer was reversed by holding that employer employee relationship could not be established by the revenue and the payments made to the doctors could have been considered as salary only in that eventuality. It was further held that the doctors' visit was not confined to one hospital only and they may be visiting various hospitals by remaining 'on call'. Therefore, the assessee-respondent was not liable for TDS under Section 201 of the Act and no interest could have been charged under Section 201(1A) of the Act. Accordingly, the demand raised by the Assessing Officer was deleted.

On further appeal filed by the revenue, the Tribunal upheld the order of the CIT (A) by expressing the view that there was no evidence of employer employee relationship between the visiting doctors and the assessee-respondent. It has further been found that doctors were visiting the hospital after receiving call to examine/operate the patient(s) and they were paid professional charges for that service and the income so earned had been assessed

in the hands of such doctors under the head 'income from business/profession'. The revenue was not in a position to controvert the aforementioned contention raised by the assessee-respondent before the Tribunal. It was, therefore, held that the Assessing Officer was not justified in treating the professional income earned by the doctors as income constituting salary.

After hearing learned counsel for the appellant-revenue, we are of the considered view that the question with regard to employer employee relationship is necessarily a question of fact. There are categorical findings that the doctors were visiting the assessee and were on call. In other words, they were not in the service of the hospital in their capacity as employee and such doctors were free to attend other hospitals as and when required. The revenue was not able to produce any evidence to show that there was employer employee relationship. These are necessarily questions of facts and accordingly the provisions of the Act concerning TDS and interest under Section 201(1A) of the Act would not be attracted. The aforementioned view is supported by judgment of the Calcutta High Court in the case of **Income Tax Officer. v. Calcutta Medical Research Institute (ITA No. 2706 (Cal) of 1996, decided on 1.11.1999)**.

For the aforementioned reasons, this appeal fails and the same is dismissed.

(M.M. KUMAR)
JUDGE

(AJAY KUMAR MITTAL)
JUDGE

October 4, 2007
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